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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re JACOB S., A Person Coming Under the Juvenile Court Law.	
KERN COUNTY DEPARTMENT OF HUMAN SERVICES, Plaintiff and Respondent, v. LORIANNE S., Defendants and Appellants.	F044268 (Super. Ct. No. JD098621) **O P I N I O N**

APPEAL from a judgment of the Superior Court of Kern County. Michael G. Bush, Judge.

Christopher Blake, under appointment by the Court of Appeal, for Defendant and Appellant.

B.C. Barmann, Sr., County Counsel, and Susan M. Gill, Deputy County Counsel, for Plaintiff and Respondent.

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Lorianne S. appeals from an order terminating her parental rights (Welf. & Inst. Code, § 366.26) to her son, Jacob.[1] She claims neither the court nor respondent Kern County Department of Human Services (the department) adequately investigated the possibility that Jacob could be an Indian child entitled to the protections afforded by the federal Indian Child Welfare Act (ICWA; 25 U.S.C. § 1901 et seq.). We hold that once the department makes the requisite showing of its compliance with 25 United States Code section 1912(a), any party claiming the department's actions were inadequate must raise that issue in the juvenile court for hearing thereon. Appellant's failure here to raise the matter below leaves us no record of error to review. Accordingly, we affirm.

PROCEDURAL AND FACTUAL HISTORY

The department initiated these dependency proceedings within days of Jacob's birth in November 2002 due to appellant's and the alleged father's substance abuse. At the initial detention hearing, the court questioned appellant about Eric B., Jacob's alleged father. Through her attorney, appellant made an offer of proof that she had never married, but she believed Eric B. was Jacob's biological father based on an exclusive sexual relationship she claimed to have with him at the time of Jacob's conception. She had not seen the alleged father, however, since she was four months pregnant. The balance of the record reveals Eric B. never made an appearance in this case. He also did not respond to communications from his court-appointed counsel or notices from the court or the department.

Next, the court inquired of the mother: "Mom, do you know if you have any Indian heritage?" She replied "No, I don't." The court in turn asked: [d]o you know if Mr. [B.] does?" She responded: "I recall his dad talking about it when we used to live with his dad." When the court asked if a particular tribe was mentioned, appellant

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[1] All statutory references are to the Welfare and Institutions Code unless otherwise indicated.

answered: "Not specifically, no." The court then ordered the social worker to give notice of the proceedings to the Bureau of Indian Affairs (BIA).

Thereafter, the department gave BIA notice of these proceedings on three occasions: first immediately after the detention hearing, next following the jurisdictional hearing in January 2003 and prior to the dispositional hearing in February 2003 and last in preparation for the section 366.26 hearing. Meanwhile, in January 2003, the court exercised its jurisdiction over Jacob pursuant to section 300, subdivisions (b) and (j). The following month the court adjudged Jacob a dependent child, removed him from parental custody and denied the alleged father and appellant services, respectively under section 361.5, subdivisions (a) and (b)(11). The court also set a section 366.26 hearing to select and implement a permanent plan for Jacob.

Sometime after the department sent its third notice to BIA, a department social worker contacted a BIA agent who advised "insufficient information exists to determine if [ICWA] would apply." It is unclear from the record to what "insufficient information" the BIA agent was referring. The record does include, however, a copy of an "SOC 319" notice form, "NOTICE OF INVOLUNTARY CHILD CUSTODY PROCEEDING INVOLVING AN INDIAN CHILD" along with proof of registered mailing to and a return receipt from BIA that the department sent. The social worker completed the SOC 319 notice form by filling in designated boxes for the child's, appellant's and the alleged father's names, places and dates of birth. She inserted the word "unknown" in the boxes for their tribal affiliation.

At the section 366.26 hearing ultimately conducted in November 2003, the court found the department provided proper ICWA notice and, because there was no reason to believe Jacob was an Indian child, determined that ICWA did not apply. Having also found that Jacob was likely to be adopted, the court terminated parental rights.

DISCUSSION

ICWA protects the interests of Indian children and promotes the stability and security of Indian tribes and families by establishing certain minimum federal standards in juvenile dependency actions. (*In re Kahlen W.* (1991) 233 Cal.App.3d 1414, 1421.) ICWA defines an Indian child as any unmarried person who is under age 18 and is either: (1) a member of an Indian tribe, or (2) eligible for membership in an Indian tribe and the biological child of a member of an Indian tribe. (25 U.S.C. § 1903(4).) When a state court "knows or has reason to know that an Indian child is involved" in a juvenile dependency proceeding, a duty to give notice under ICWA arises. (25 U.S.C. § 1912(a); *In re Kahlen W., supra,* 233 Cal.App.3d at p. 1421.) The Indian status of the child need not be certain in order to trigger notice. (*In re Kahlen W.*, *supra*, 233 Cal.App.3d at p. 1422.) The requisite notice enables the tribe or BIA, in part, to investigate and determine whether the minor is an "Indian child." (*In re Junious M.* (1983) 144 Cal.App.3d 786, 796.)

In *In re H.A.* (2002) 103 Cal.App.4th 1206, 1209, we spoke to the imperative of social service entities complying with the letter of the ICWA and making an adequate record of such compliance. In order to ensure compliance with ICWA notice requirements, we held that the department, in seeking the foster care placement of or termination of parental rights to a child, who may be eligible for Indian child status, must do the following or face the strong likelihood of reversal on appeal to this court. (*In re H.A., supra,* 103 Cal.App.4th at p. 1214.)

> "First, the Department must complete and serve, pursuant to the terms of 25 United States Code section 1912(a), the 'NOTICE OF INVOLUNTARY CHILD CUSTODY PROCEEDING INVOLVING AN INDIAN CHILD' along with a copy of the dependency petition. Second, the Department must file with the superior court copies of proof of the registered mail or certified mail and the return receipt(s), the completed 'NOTICE OF INVOLUNTARY CHILD CUSTODY PROCEEDING INVOLVING AN

INDIAN CHILD' that was served, and any responses received." (*In re H.A., supra,* 103 Cal.App.4th at p. 1215.)

Requiring the department to file such copies with the trial court, rather than accepting a statement of compliance contained in a social worker's report to the court, was frankly an unusual appellate step. Ordinarily, courts will presume, absent evidence to the contrary, that an official duty has been regularly performed. (Evid. Code, § 664.) Moreover, in dependency appeals, we routinely accept the representations of social workers contained in their reports to the juvenile court for substantial evidence purposes unless the juvenile court makes contrary findings expressed or implied. We nevertheless characterized such a record as "deficient." (*In re H.A., supra,* 103 Cal.App.4th at p. 1214.) We required the department to file copies of "proof of the registered mail or certified mail and the return receipt(s), the completed 'NOTICE OF INVOLUNTARY CHILD CUSTODY PROCEEDING INVOLVING AN INDIAN CHILD' that was served, and any responses received" to facilitate the trial court's sua sponte duty to assure compliance with ICWA notice requirements and our review of the court's finding(s). (*Id.* at pp. 1211, 1214-1215.)

In the present case, the department complied with the letter of 25 United States Code section 1912(a) and this court's holding in *In re H.A., supra.* Nevertheless and for the first time on appeal, appellant criticizes the notice the department sent to BIA as "skeletal in the extreme." Claiming that the department knew the identity and location of the alleged father's parents and her mother and maternal aunts, appellant contends the department should have made an effort to contact these individuals and provide BIA with identifying information about the grandparents. Further, assuming the department did not make any effort to acquire information from or about the grandparents, appellant claims the department failed to adequately investigate the possibility that Jacob could be an Indian child. She invites our court to endorse a rule that social workers should routinely

contact known older relatives of a child to whom ICWA may apply for genealogical information.

We decline appellant's invitation to define the scope of a department's duty to investigate the applicability of ICWA in general and here in particular. We do so because appellant has not satisfied her burden of affirmatively showing error on the record. (*Calhoun* v. *Hildebrandt* (1964) 230 Cal.App.2d 70, 72.) The premise for her argument--the department did not make any effort, let alone a reasonable effort, to acquire information from or about the grandparents and submit that information to BIA--is speculative. The record is simply silent on this point.

We are struck by the fact that appellant and more importantly her trial counsel were mute when the department presented its evidence of ICWA compliance and the juvenile court made its findings and yet appellate counsel now passionately argues how neglectful the department was. If appellant and/or her counsel seriously believed the department did not do enough and could have done more, we question their silence given our decision in *In re H.A., supra,* and the opportunity to resolve any factual issue then and there.

It is the department's burden to give notice as mandated by 25 United States Code section 1912(a) and make a documentary record of its compliance in light of our *In re H.A., supra,* opinion. However, once the department presents proof of its compliance, counsel must speak up if he or she has reason to believe the department did not do enough and could have done more.

Case authority abounds on the subject of issue preservation in the trial court. Failure to preserve an issue in the trial court by means of an appropriate request ordinarily precludes a party from raising the point on appeal. (*People* v. *Capps* (1989) 215 Cal.App.3d 1112, 1118.) It is unfair to the trial court and the adverse party to give appellate consideration to an alleged procedural defect which could have been presented to, and may well have been cured by, the trial court. (*Menefee* v. *County of Fresno*

(1985) 163 Cal.App.3d 1175, 1182.) For an appellate court to examine an issue raised for the first time on appeal, would in effect sanction a practice of allowing a party to keep its legal contentions secret during trial and later obtain appellate review on a theory never tendered to the trial court. (*Null* v. *City of Los Angeles* (1988) 206 Cal.App.3d 1528, 1535.)

Admittedly, this court does not require issue preservation in juvenile court regarding ICWA notice compliance. This is because the juvenile court has a sua sponte duty to assure compliance with those precise statutory requirements. (*In re H.A., supra,* 103 Cal.App.4th at p. 1211, citing *In re Desiree F.* (2000) 83 Cal.App.4th 460, 469.) However, where, as in this case, the department made the requisite showing of its compliance with 25 United States Code section 1912(a), the court satisfied its duty as well unless another party voiced its concern about the adequacy of the department's actions.

Consequently, we hold once a department makes the requisite showing of its compliance with 25 United States Code section 1912(a), any party who essentially claims the department did not do enough and could have done more to investigate and/or provide more information to BIA or a tribe must raise those issues in the juvenile court where the court can hear evidence and resolve any factual dispute. In other words, once the department has made the requisite showing of its compliance with 25 United States Code section 1912(a), the burden shifts to other parties to question whether the department reasonably could, but did not, make an effort to acquire information from or about other relatives and provide BIA or a tribe with such identifying information. Absent a record showing, there is nothing for us to review.

To the extent appellant relies on *In re Karla C.* (2003) 113 Cal.App.4th 166 and *In re D.T.* (2003) 113 Cal.App.4th 1449, neither of those decisions persuade us to reach a different conclusion here. In each decision, the appellate court reasoned the department also must present documentary proof of compliance with a federal regulation, more

detailed than ICWA itself, to warrant a finding that it complied with ICWA notice requirements. In particular, that regulation (25 C.F.R. § 23.11(d) (2003)) states notice to BIA or an identified tribe shall include the following information, if known:

> "(3) All names known, and current and former addresses of the Indian child's biological mother, biological father, maternal and paternal grandparents and great grandparents or Indian custodians, including maiden, married and former names or aliases; birthdates; places of birth and death; tribal enrollment numbers, and/or other identifying information."

We have not required such additional documentary proof to support a finding of ICWA notice compliance. Because the department in this case made the record required by *In re H.A., supra,* we will not now hold their compliance against them. We will not assume, as appellant would have us do, that the department did not make any effort, let alone a reasonable effort, to acquire information from or about the grandparents and submit such information to BIA.

DISPOSITION

The order terminating parental rights is affirmed.

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Vartabedian, Acting P.J.

WE CONCUR:

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Buckley, J.

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Levy, J.